Afraid of Their Own Courage? Some Preliminary Reflections on LM

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Mattias Wendel Do 26 Jul 2018 Do 26 Jul 2018

The much-awaited judgment in the case *LM* (also known as *Celmer*) is a landmark decision. The European Court of Justice acknowledged for the very first time that the essence of the right to a fair trial prohibits, under certain circumstances, the surrender of individuals from one EU Member State to another. Against the backdrop of the rule of law crisis in Poland and elsewhere, this acknowledgment is certain to be seen as a big step towards strengthening the rule of law in Europe. At the same time, the decision falls short of the expectations of those who wanted the Court of Justice to assess the independence of the Polish judiciary in substance. Such a substantive assessment by Luxembourg would have been a novel and arguably more effective approach to responding to the rule of law crisis, particularly within the framework of a preliminary reference procedure. With its preceding judgment in *ASJP*, the Great Chamber had even identified the legal instrument by which this new path could be pursued: Article 19 TEU. Or at least so it seemed. Alas things did not quite turn out that way this time. In *LM* the Court of Justice sidestepped a substantive review of judicial independence in Poland, leaving the task to the national courts. Could it be that in *LM* the judges in Luxembourg were afraid of their own courage previously demonstrated in *ASJP*?

Framing the Case in Terms of Fundamental Rights: The Right to Fair Trial

The novelty of *LM* lies in its focus on the essence of the right to fair trial under Article 47 § 2 CFR. The Court of Justice decided that national judicial authorities must refrain from giving effect to European Arrest Warrants if there is a real risk that the persons concerned would suffer a breach of their „fundamental right to an independent tribunal and, therefore, of the essence of [their] fundamental right to a fair trial.“ One important consequence is that a person is henceforth protected against transfers to other EU Member States in which a lack of judicial independence would endanger the essence of his or her right to fair trial. This sends a clear message to the Polish government.

From a doctrinal perspective, the Court of Justice adopts, in principle, the fundamental rights framing which had been initially suggested by the referring High Court of Ireland and later on supported by Advocate General *Tanchev*. Interestingly, the Court of Justice applies its previous case law on Article 4 CFR (*Aranyosi et al.* in particular) to fair trial cases. Taking into consideration that Article 4 CFR is protected in absolute terms, while Article 47 § 2 CFR is not, this step is far from self-evident. The categorical difference between the two fundamental rights did not motivate the Court of Justice to adopt the (narrow) condition used by the ECtHR in expulsion cases, i.e. the requirement of a “flagrant denial of justice”. However, the difference between Article 4 and Article 47 § 2 CFR may explain why the Court of Justice puts the *essence* of the right to fair trial at the centre of its reasoning. Not every risk of a violation of Article 47 § 2 CFR seems to justify a prohibition of surrender, but only a risk of a violation related to its essence. The requirement of judicial independence, which is further substantiated in the judgment and the “cardinal importance” of which is highlighted by the Court of Justice in the context of the values set out in Article 2 TEU, is convincingly argued to form part of this essence. However, by relying on the concept of the

“essence of a fundamental right” in the context of inner-European transfers, the Court of Justice opens up a whole new range of questions – questions also relating to the field of EU asylum law, which cannot be dealt with here in detail.

Applying the *Aranyosi*-Test in Full

Unlike the referring Court’s proposal, the Court of Justice does not significantly modify its non-surrender approach initially developed with regard to Article 4 CFR. Rather the *Aranyosi*-test is applied in full to the case at hand. Hence, the Court of Justice requires national judicial authorities to follow a two-step-approach. In a first step, they have to assess whether there is „a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State’s courts.“

However, as in *Aranyosi* and in open contrast to the Irish High Court’s suggestion, the Court of Justice also upholds the second step. It does not deem the existence of deficiencies at the systemic-general level to be a sufficient condition for non-surrender. Rather, the national court must, in a second step, also assess whether the systemic or generalised deficiencies would impact *in concreto* the case at hand with regard to all particular circumstances, including the individual’s personal situation as well as the nature of the offence for which he or she is being prosecuted. This requirement limits the impact of the *LM*-jurisprudence on cases related to a (systemic) rule of law crisis considerably. And on the basis of the preliminary reference it seems far from clear whether *LM* will not be surrendered to Poland after all.

Neglecting Article 19 TEU?

It is here that the question arises why the Court of Justice did not take the opportunity to rely predominantly on Article 19 TEU instead of framing the case in terms of fundamental rights. Certainly, the referring court had asked specifically for the interpretation of fundamental (or rather ECHR) rights. Furthermore, *ASJP*, in which the Member States’ obligation to safeguard judicial independence was linked to Article 19 TEU, was not a case about the execution of a European Arrest Warrant. And finally, Article 19 TEU and *ASJP* do indeed play a role in *LM* with regard to the normative importance of safeguarding judicial independence at the national level.

However, *ASJP* could very well have served as a door opener for a broader judicial review in cases such as the one at hand. In *ASJP* the Court of Justice postulated a general “principle of the effective judicial protection of individuals’ rights under EU law,” applicable in all fields covered by EU law, irrespective of whether the Member States concerned are implementing EU law in the meaning of Article 51 CFR. This principle was based on the premise that the functioning of the national judiciary – its independence included – is *conditio sine qua non* for the functioning of a Union based on the rule of law as a whole. Understood in this sense, this principle would have provided the Court of Justice with a proper standard for reviewing whether or not a certain Member State complies with its obligation to ensure, within the scope of EU law, the necessary degree of judicial

independence. In contrast to the fundamental rights framing in *LM*, this approach would not have required, according to this reading at least, the applicant to demonstrate a real risk that the essence of his or her right to fair trial would be violated *in concreto*.

Sidestepping a Substantive Review: Empowering or Abandoning National Courts?

Relying (predominantly) on Article 19 TEU would have also arguably made it more difficult for the Court of Justice to shy away from assessing the independence of the Polish judiciary itself. In *ASJP*, the Great Chamber, albeit briefly and with an ultimately moderate as well as well-founded result, actually *assessed* a Portuguese austerity measure and its (non-)effects on the independence of the national judiciary. A substantive assessment of judicial independence in Poland would have provided legal certainty at the EU level and sent a clear message to the Polish government that the undermining of the rule of law by one Member State is a *legal* question that cannot, in a Union based on the rule of law, be ignored by the EU's highest judges. However, a look at the pending infringement procedures launched by the Commission tells us that the story is far from being over. By the way, *N.S.* (in contrast to *Aranyosi*) shows that an assessment of the systemic deficiencies in a Member State is also possible within the framework of a fundamental rights case.

It may very well be that the idea of a centralized assessment by the Court of Justice of the judicial independence in Poland is too simplistic. Is there not a positive element of judicial restraint in *LM*? And is there not also some virtue in a non-centralized approach, empowering national courts to play their part in a system of mutual, albeit exceptional checks? On the other hand, if I were the referring judge in the matter at hand, having borne the brunt of a ghastly and highly personalized campaign following the preliminary reference, would I be satisfied with the response of the Court of Justice? Would I consider the rather abstract criteria developed by the Court of Justice to be helpful tools for closing the case in a persuasive and conclusive manner?

Mutual Trust or Federal Distribution of Human Rights Responsibility

LM once more reveals that the famous principle of mutual trust is, in the field of fundamental rights, a terminologically irritating denomination for the important federal problem of distributing fundamental rights responsibilities horizontally, i.e. amongst the Member States. It is not so much about trust in the proper sense of the word, but, as the Court of Justice aptly put it itself, about a legal "require[ment] to presume" that other Member States, being bound by the Charter and being parties to the ECHR, generally respect (EU) fundamental rights.

The challenge is, of course, determining the point at which this horizontal presumption of fundamental rights compliance is to be rebutted. Transforming the courts of Member State A to watchdogs of the independence of their colleagues in Member State B is not an unproblematic endeavour. Holding the executing Member State A itself responsible for transferring a person to Member State B where he or she would be exposed to a real risk of

the said dimension, always means preventively shifting the human rights responsibility from troublemaking Member State B to Member State A. This could even create negative incentives. In this respect, the Court of Justice is right to point out that the principle of mutual trust (and mutual recognition) may be limited only in “exceptional circumstances.” The question remains, however, if the rule of law crisis in Poland may not constitute such an exceptional circumstance, even if it would not affect every criminal case individually.

Mapping the Role of the Judiciary and the Article-7-Procedure

Finally, the more general question arises as to where the Court of Justice sees the role of the judiciary – itself included – in the rule of law crisis against the backdrop of the Article-7-procedure. On the one hand, the Court of Justice highlights the importance of the Commission’s reasoned proposal under Article 7 § 1 for the purpose of assessing the existence of systemic or general deficiencies (first step of the *Aranyosi*-test). This is a very important and practical relevant statement.

On the other hand, according to Luxembourg, there can be no automatic ban on surrenders as long as the European Council has not taken a decision under Article 7 § 2 determining that the respective Member State is seriously and persistently breaching the values set out in Article 2 TEU. That the Court of Justice seems to draw this conclusion predominantly based on recital 10 of the EAW Framework Decision, and not primary law, is certainly one of the weakest parts of the judgment, given that EU secondary law can hardly determine the relationship between Article 7 TEU and fundamental rights review. Article 269 TFEU which (only?) seems to shield the political nature of the Article-7-procedure from the Court of Justice is not mentioned at all.

Final Remark

Finally, when the Court of Justice highlights the important role of the European Council, the reasoning of the Court appears to suggest at first sight that there is no room to judicially address the rule of law crisis in its overarching and general dimension. But this is precisely what the Court seems to have implied in *ASJP* – an act of judicial courage that, in *LM* at least, it arguably did not do justice. It could do so, however, in the pending and forthcoming infringement procedures.

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